89-247

No.



**IN THE SUPREME COURT OF THE UNITED STATES**
*October Term, 1989*

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**THE STATE OF COLORADO,**

*Petitioner,*

*vs.*

**JOHN WESLEY LACY, JR.,**

*Respondent.*

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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## ISSUES PRESENTED FOR REVIEW

Under the United States Constitution, when a conviction obtained by guilty plea is challenged because the judge did not fully explain the elements of the charge,

I. can it be presumed that the defendant received a sufficient explanation of the nature of the charge when there is direct evidence that defense counsel explained the charge and no evidence to the contrary?

II. can the factual basis, when read in the presence of a defendant and his counsel, inform the defendant about the nature of the charge and serve as a substitute for a voluntary admission that the defendant had the requisite intent?

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IN THE SUPREME COURT OF THE UNITED STATES

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THE STATE OF COLORADO,

*Petitioner,*

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*Respondent,*

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

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## OPINION BELOW

The trial court's unreported order is included as Appendix A. The unpublished opinion of the Colorado Court of Appeals, *People v. Lacy*, No. 85CA1264 (Colo. App. May 14, 1987), is included as Appendix B. The opinion of the Colorado Supreme Court, *Lacy v. People*, No. 87SC262 (Colo. April 24, 1989) (as modified following petition for rehearing), is attached as Appendix C. (This opinion does not yet appear in a regional reporter.) The Colorado Supreme Court's order of June 5, 1989, denying Colorado's petition for rehearing, is included as Appendix D.

## JURISDICTION

The Colorado Supreme Court issued its judgment on April 24, 1989, and denied Colorado's petition for rehearing on June 5, 1989. In its opinion, the court found convictions from Ohio and Washington to have been obtained in violation of the United States Constitution because the courts in those states had not fully advised the respondent about the charges to which he pleaded guilty. Jurisdiction is invoked pursuant to 28 U.S.C. sec. 1257.

## CONSTITUTIONAL PROVISIONS

Amendment XIV of the United States Constitution states, in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law....

## STATEMENT OF THE CASE

On February 9, 1985, the respondent, John Wesley Lacy, Jr., attacked and tried to kidnap a woman outside of an Elks Club in Jefferson County, Colorado. Lacy was arrested and charged with attempted kidnapping and assault. On March 25, 1985, he was also charged, under Colorado's habitual criminal statute, with having four prior felony convictions.[1]

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[1]Under Colo. Rev. Stat. sec. 16-13-101(2) (1986), a person convicted of any felony in Colorado who has been three times previously convicted upon separate felony charges shall be

Lacy filed motions to dismiss the habitual criminal counts in March and May of 1985. He challenged four prior convictions, but only two are at issue here.[2]

The first was Lacy's 1980 plea to second degree assault from Spokane County, Washington. Lacy based his claim on the Washington court's failure to explain the mental state element (*i.e.*, knowingly...with intent to commit rape). However, Lacy, who could read, had been given a copy of the information, and it stated the elements of the offense, including the requisite mental state.[3] Lacy acknowledged, in

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adjudged an habitual criminal and punished by incarceration for a life term. Under subsection (1) of this statute, a person who has been twice convicted within ten years shall be incarcerated for a term of 25 to 50 years.

[2]In both of the convictions at issue here, the advisements were complete as to the constitutional rights being waived (to jury trial, to testify or remain silent, to confront witnesses, to compulsory process, to appeal, etc.) and possible penalties, and Lacy was fully examined about whether his pleas were voluntary (Defendant's Exhibit 3, pp. 4-7; Defendant's Exhibit 4, pp. 3-5).

[3]The information read as follows:

> That the defendant, JOHN WESLEY LACY, JR., in Spokane County, Washington, on or about March 6, 1980, with intent to commit the felony of Second Degree Rape, did knowingly assault Geraldine A. Muse, a human being.

the presence of his attorney, that he had spoken with his attorney and understood the charge (Defendant's Exhibit 4, p. 3). Lacy and his attorney also heard the prosecutor give a detailed account of the incident and did not object to this characterization (Defendant's Exhibit 4, pp. 5-7).

The second conviction at issue here was Lacy's 1976 plea to theft from Mahoning County, Ohio. Again, the Ohio court did not explain the elements of the offense. However, Lacy and his attorney both signed a written guilty plea agreement in which they acknowledged that counsel had informed Lacy about the nature of the charge and the maximum penalty. The indictment, attached to the plea agreement, stated the elements of the offense, including that Lacy "with purpose to deprive the owner...knowingly obtained or exerted control...without the consent of Elbee Billup" (People's Exhibit L, p. 2). The indictment was also read before Lacy and counsel in open court (Defendant's Exhibit 3, p. 2).

In his attack on these two convictions, Lacy never alleged or testified that he did not understand the elements of the charges. Nor did he state that, had he been more fully advised, he would have chosen to go to trial.

On June 24, 1985, after taking evidence and hearing arguments, the Jefferson County District Court ruled that three of Lacy's four prior convictions could be used to support an habitual criminal charge (Appendix A). Lacy was convicted of all counts on July 26, 1985, and was sentenced to life imprisonment.

Lacy then turned to the Colorado Court of Appeals. The court of appeals affirmed Lacy's habitual criminal adjudication in an unpublished opinion. It held that each of Lacy's three prior guilty pleas had been properly obtained (Appendix B).

The Colorado Supreme Court, however, reversed, finding two of Lacy's prior convictions invalid. The supreme court, evaluating the guilty pleas under the United States Constitution, held that the Washington and Ohio courts had not sufficiently explained the elements of the offenses before the pleas were entered (Appendix C). It then remanded for imposition of the alternative 4 year sentence, which the trial court announced in case Lacy's habitual criminal adjudication was reversed.

## REASONS TO ALLOW THE WRIT

A writ of certiorari should be allowed in this case because the Colorado Supreme Court's decision conflicts with the decisions of this Court and with federal circuit courts on an issue of federal law that recurs frequently and is important. S. Ct. R. 17.1(b) and (c).

### I

Under *Henderson v. Morgan*, 426 U.S. 637 (1976), and *Marshall v. Lonberger*, 459 U.S. 422 (1983), both of Lacy's convictions should have been held constitutional. *Henderson* recognizes that defense counsel's explanation of the charges can serve as an alternative to a judicial advisement in satisfying due process requirements:

> Normally the record contains *either* an explanation of the charge by the trial judge, *or* at least a representation by defense counsel that the nature of the offense has been explained to the accused.

*Henderson*, 426 U.S. at 647 (emphasis added). In both of Lacy's pleas, there was direct and uncontroverted evidence that defense counsel had explained the nature of the offenses to Lacy. The Colorado Supreme Court knew this, but it simply disagreed that this would satisfy due process:

> [A] showing that defense counsel gave some explanation to his client of the charge to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered.

Appendix C at 33.

The Colorado Supreme Court's analysis is incorrect. When a defendant and his attorney represent in writing that the defendant has been informed of the nature of the charges, due process is satisfied under *Henderson*. Similarly, the same representation suffices when made to the court by the defendant in his attorney's presence. In both cases, it is fair to presume that counsel would not allow his client to misstate the extent of the advisement given.

Indeed, it is fair to presume that a sufficient explanation was given by counsel even when there is no direct evidence of this in the record:

> Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

*Henderson*, 426 U.S. at 647; *accord*, *Marshall*, 459 U.S. at 436.

Although the Colorado Supreme Court recognized that such a presumption exists in theory, it did not apply it in Lacy's case. The court indicated that it would not apply such a presumption unless the circumstances were compelling:

> It may be appropriate in some circumstances to presume that the defendant has been adequately informed, either by his lawyers or at some proceeding other than the providency hearing, of the charges on which he was indicted. *Marshall v. Lonberger*, 459 U.S. 422, 436-38 (1983); *Henderson*, 426 U.S. at 647. In *Marshall*, the United States Supreme Court found several factual findings made by the trial court significant to its conclusion that the accused's plea of guilty was voluntary and intelligent. Specifically, the trial court found that the accused was intelligent and experienced in the criminal justice system and was well-represented at all stages of the plea proceedings by competent counsel. In addition, the accused's counsel stipulated at the providency hearing and in the accused's presence that the indictment, which contained an explanation of the charges against him, sustained the plea of guilty. Finally, the transcript of the providency hearing revealed that a person of the accused's intelligence and experience would have understood certain statements made by the presiding judge as referring to the indictment's charge of attempt to kill. *Marshall*, 459 U.S. at

435-38.

*Lacy*, Appendix C at n. 7, p. 33.

In contrast, the *Henderson* court stated that the presumption applies in "most cases," and would have applied the presumption had it not been presented with a "unique" situation -- a trial court finding that the defendant had not been advised by counsel or the court and evidence to support that finding. Similarly, even the *Marshall* dissent recognized that the *Henderson* presumption applies *"in the absence of proof to the contrary."* *Marshall* at 442, n.2 (Brennan, J., dissenting) (emphasis added). *See also Oppel v. Meachum*, 851 F.2d 34, 38 (2nd Cir. 1988) (presumption applies when the defendant introduces no evidence to the contrary), *citing Worthen v. Meachum*, 842 F.2d 1179 (10th Cir. 1988) (presumption applied where defendant discussed plea with attorney and offered no evidence to rebut presumption that attorney explained the nature of the offense).

Thus, the Colorado Supreme Court stands the *Henderson* presumption upside down. In both of Lacy's guilty pleas, there was direct evidence that Lacy had been advised. In neither case was there evidence to rebut a presumption that these advisements had been sufficient.[4] Moreover even under

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[4]The *Lacy* Court thought the following statement, made by the victim during the Ohio providency hearing, should have prompted the Ohio court to further examine Lacy about his understanding of the charges:

> ...I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So I won't press charges against him, if it please the Court.

the Colorado Supreme Court's own restrictive view, the *Henderson* presumption should have been applied here. The circumstances surrounding Lacy's pleas nearly parallel those in *Marshall*: Lacy attended school through the twelfth grade, was highly experienced in the criminal justice system (the oldest conviction at issue here was Lacy's fifth overall and his third for car theft), and was represented at all stages of the plea proceedings (Defendant's Exhibit 1, p. 3; Court's Exhibit 1, pp. 23-24).

II

Lacy's 1980 plea to assault from Washington was condemned by a 4-3 vote of the Colorado Supreme Court. The majority found an insufficient showing that Lacy understood the elements of the offense, particularly the requirement that the assault be done with intent to commit rape.

The dissent, however, thought that Lacy's understanding of the charge could properly be inferred from the circumstances: Lacy admitted that he had choked the victim (Defendant's Exhibit 4, p. 5); he had a copy of the written

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(Defendant's Exhibit 3, p. 4). This statement was ambiguous, and was obviously not understood to mean that Lacy had obtained consent. The Ohio court could reasonably rely on defense counsel not to let his client plead guilty if innocent. Lacy's attorney would not have undergone "extensive negotiations" or requested the plea bargain "as a favor," if Lacy had had permission to take the car because trial would have been a simple matter (Defendant-s Exhibit 3, pp. 2-3). Thus, Billup's statement does not rebut a presumption that Lacy was adequately advised.

information, which listed all of the elements (Court's Exhibit II); he was present for a discussion about whether a "Sexual Psychopathy Petition," should be filed in his case and agreed that it should be filed (Defendant's Exhibit 4, p. 4); Lacy and his attorney heard the prosecutor describe the incident and did not object to the characterization. This description established the sexual nature of the assault:

> [The victim] accepted a ride home and gave Mr. Lacy directions to an apartment house just north of Ferris High School and Mr. Lacy drove her directly from downtown Spokane to the apartment house parking lot. At the parking lot she started to leave the car to go up to the apartment. Mr. Lacy asked her to wait a minute. She was then pulled back into the car and he attempted to kiss her and she struggled and it is indicated he then choked her with his hands around her neck, and she lost consciousness. When she awoke she was laying in the front seat of the car on the floor and observed that there were a number of trees around the area. She believed the car had been moved, and she saw Mr. Lacy in the driver seat of the car masturbating, and when he saw her wake up he then went from his side of the car over to her side and, again, there was a brief struggle. Threats were made that she should comply with his demands or she would be killed, and she then stopped struggling and he was able to partially remove her blouse by unzipping it, and, again, to take her pants down to her ankles. She was then taken from the car out to

> a wooded area. They walked from the car and there, again, more demands were made, and threats were made.
>
> * * *
>
> Also, Mr. Lacy, Your Honor, then did give a statement to detective Teigen, and indicated that he did check her but felt she was still conscious; that her pants were pulled down; that he did have occasion to place his mouth on her breasts; that he was masturbating, and it seems

he feels that he had too much to drink and he got a little crazy.

(Defendant's Exhibit 4, pp. 6-7).

The dissent, not the majority, was correct here. Due process under the United States Constitution requires only that it be fair to conclude that the defendant intelligently and voluntarily waived his trial rights. The concern in *Boykin v. Alabama*, 395 U.S. 238 (1969), was that this Court could not fairly conclude that the defendant had acted intelligently and voluntarily when he pleaded guilty to 5 charges, each of which could bring death, without any indication that he had been advised about his rights or the possible penalties. Similarly, it was not possible to fairly conclude that the defendant in *Henderson* had waived his trial rights voluntarily and intelligently when all indications were that he had never been advised about the charges.

But in *Lacy*, such a conclusion is fair. Lacy knew what he was giving up and what he was getting. He and his attorney agreed to the plea in exchange for sentence

concessions; he admitted assaulting the victim; he and his attorney acquiesced in the prosecutor's reading of the factual basis. That he was never advised by the judge about the requirement of intent to rape is a meaningless deficiency when it was clear what the charge was about. Lacy could not have spoken with his attorney, read the information, and heard the prosecutor's version of events without knowing that intent to rape was part of the charge.

The circumstances of Lacy's Washington plea, taken together, constitute the "substitute for a voluntary admission" recognized by this Court:

> There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent.

*Henderson*, at 646. *Lacy* conflicts with *Henderson* because it rejects the idea that a defendant can be informed about the mental state requirement in a variety of ways. Its form-over-substance ruling unfairly elevates due process requirements of the United States Constitution beyond the levels required by *Boykin* and *Henderson*. *Lacy* thus conflicts with the decisions of this Court.

III

*Lacy* is important because it affects critical areas of the criminal justice system. The manner in which guilty pleas are taken, the extent to which they can be relied on as final judgments, the state's ability to use guilty pleas for sentence enhancement and impeachment, and the respect normally accorded judgments of sister states are all affected.

Under *Lacy*, it is more important for judges to say certain words during advisements than to ascertain whether defendants actually understand what they are facing. No deference is given to a judge's finding of an understanding plea when that is based on observations about the defendant's experience and demeanor and the competence of his attorney. Instead, under the United States Constitution, formal litanies are now required. To the extent that lower courts conform to meet the *Lacy* standard of review, providency hearings will be less based on reality and more on ritual.

*Lacy* also upsets the finality of judgments. Unless the *Henderson* presumption is given force, guilty pleas can be overturned for technical flaws in advisements. Convictions which were once reliable can be overturned on collateral attack. Such challenges may come years after a plea is made; and by then, it is virtually impossible to meet *Lacy's* standard of review: documents are destroyed, witnesses are difficult to locate, memories fade. This is highly significant because the vast majority of convictions are obtained through pleas. "In practice, guilty pleas account for roughly 90 per cent of all criminal convictions." D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, p. 8 (F. Remington, ed. 1966). And if states cannot effectively combat collateral attacks under a *Lacy* standard of review, neither can they afford to try those who are released. Even

when the evidence is not stale, the cost of diverting resources -- prosecutors, public defenders, judges, clerks -- from current matters is prohibitive.

*Lacy* impairs the ability of states to combat recidivism because it weakens the extent to which states can rely on criminal convictions for sentence enhancement. It is of utmost importance that the states have tools to protect society against the harm caused by recurrent criminality. This court has recognized the importance of policies underlying habitual offender statutes, which exist in many jurisdictions. *Rummel v. Estelle*, 445 U.S. 263, 276 (1980). These policies are undermined when otherwise reliable determinations of previous guilt are discarded on the technical grounds at issue here. It is not merely that many more prior convictions will be invalidated. It is also that, in situations such as *Lacy*, the convictions are invalidated when there is no serious question that the defendant did the acts for which he was convicted. Further, schemes other than habitual criminal statutes are also affected.[5]

Similarly, *Lacy* impairs the use of prior convictions for impeachment purposes. That convicted felons tend to be unreliable witnesses, and that their credibility can be impeached during testimony is a legitimate policy decision made by many state legislatures.[6] *Lacy* frustrates this policy by allowing many convictions to be unfairly invalidated. This can have real consequences: a former convict will lie not only on his own behalf but will lie to acquit his friends as well.

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[5]For example, Colo. Rev. Stat. 16-11-201(2) disqualifies those who have two prior felony convictions from receiving probation.

[6]E.g., Colo. Rev. Stat. 13-90-101.

Finally, *Lacy* erodes the respect which is normally accorded the judgments of sister states and makes conflict between the states more likely. If Lacy, for example, is arrested for a crime in Georgia and charged under that state's habitual offender statute, the question will arise whether his convictions from Ohio and Washington are valid. Certainly, the convictions are still valid in Ohio and Washington. And just as clearly, they are invalid in Colorado. Georgia will necessarily have to reject the judgment of one or more states, judgments that were purportedly rendered under due process standards of the United States Constitution that should be the same for all.

The United States Supreme Court has not written on the applicability of the *Henderson* presumption since *Marshall v. Lonberger*. As *Lacy* indicates, there is a real need for guidance. It is clear after *Henderson* that courts cannot presume a sufficient advisement when all the evidence points otherwise. And it is clear after *Marshall* that the presumption applies in some circumstances. But it is not clear, at least to the Colorado Supreme Court, that the *Henderson* presumption really does imply, in the absence of evidence to the contrary, that a represented defendant has been advised sufficient to satisfy due process under the United States Constitution.

## CONCLUSION

Because this case is important to the operation of the criminal justice system, and because there is a need for authoritative guidance in this area, the United States Supreme Court should issue a writ of certiorari.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT, JEFFERSON COUNTY COLORADO
Case No. 85 CR 0249 - Division 3

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ORDER

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THE PEOPLE OF THE STATE OF COLORADO,
vs.
JOHN WESLEY LACY, JR.,

DEFENDANT.

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This matter is before the Court on a motion to dismiss habitual criminal counts filed by the defendant, on a supplemental motion to dismiss habitual criminal counts filed by the defendant, and on a motion to strike defendant's supplemental motion to dismiss habitual criminal counts filed by the People. The Court has heard evidence and has heard extensive arguments and now makes the following findings of fact, conclusions of law and orders:

* * *

On February 11, 1976, the defendant entered a plea of guilty before Judge Clyde W. Osborne in the Court of Common Pleas, Mahoning County, State of Ohio. At that time Judge Osborne had before him a written plea of guilty, and the defendant personally appeared before Judge Osborne and entered his plea of guilty. From the proceedings in open court and the written plea of guilty, which was before the Judge at the time of taking the plea of guilty, the Court finds that the defendant was advised of the nature of the charge, the maximum penalty or penalties, the effect of his guilty plea, of his right to a trial by jury, of his right to confront witnesses, of his right to have compulsory process for obtaining witnesses,

of the right to have the State prove the charges beyond a reasonable doubt, of his right to remain silent, and of his right to an appeal. The defendant was represented by counsel and waived his rights and entered a plea of guilty in open court while being represented by an attorney.

The Court finds from these facts that the defendant's plea of guilty on February 11, 1976, was voluntary and that the defendant was advised as to his Constitutional rights before entering that plea.

On June 6, 1980, the defendant entered a plea of guilty in the Superior Court in and for the County of Spokane, State of Washington, before Judge Donald N. Olson. The defendant was represented by counsel. He acknowledged that he knew he was charged with the crime of second degree assault, he was advised as to the possible penalties, was advised of his right to a trial by jury, was advised of his right to have a lawyer and that if he couldn't afford one, one would be appointed, was advised of his right of confrontation, was advised of his right to call witnesses, was advised of his right to testify, was advised of his right to remain silent, was advised that the State must prove the charges beyond a reasonable doubt and was advised of his right to appeal. After being advised of these rights, the District Attorney made a detailed statement of the facts he would prove if the case were to go to trial.

The Court finds from these facts that the defendant's plea of guilty on June 6, 1980, was voluntary and that the defendant was advised as to his Constitutional rights before entering that plea.

## CONCLUSIONS OF LAW

In the case of People v. Van Hook, 36 Colo. App. 226; 539 P.2d 507, the Trial Court apparently relied solely on a written plea of guilty by the defendant. The Court of Appeals said:

> "Secondly, we hold that under the law of Sandoval and Kelly, supra, and precursors thereto, compliance with Crim. P. 11 cannot be demonstrated solely by reliance upon a printed form. See People v. Sanders, 185 Colo. 356, 524 P.2d 299. In Kelly it is stated that:
>
> Before a trial court accepts a plea of guilty or a nolo contendere plea, it must ascertain that the defendant has been advised of his rights as an accused person; that he is waiving those rights; that he understands the nature and elements of the charge involved; that he understands the possible penalty or penalties which may be imposed; and that his plea is voluntary and not the result of undue influence or coercion on the part of anyone."

It is the opinion of this Court that the decision in Van Hook was not meant to preclude the use of a written plea of guilty, but was meant only to prohibit the use of a written plea without any oral explanation by the Court. In this case it is clear from a combination of the written plea and the oral advisements given by the judge in three of our four cases that the defendant was adequately advised of his Constitutional rights.

The question has been raised as to what law should be applied in determining whether a defendant has been properly advised of his Constitutional rights. It is clear that the plea must meet Federal Constitutional standards as set forth in Boykin v. Alabama, 395 U.S. 242; 89 S.Ct. 1709.

It is also clear that the pleas must meet the Constitutional standards of the states in which the pleas were entered.

Defense counsel has furnished to the Court information as to the standards in Ohio and Washington on the dates in question. The District Attorney has furnished no information to the contrary.

It is also clear that the plea of guilty must meet the standards of the state in which the pleas are offered in evidence, in this case Colorado.

This Court concludes that the pleas of guilty involved in the fourth, fifth and sixth counts do meet the standards set forth by the Supreme Court of the United States, the statutes decisions and rules in the state of Ohio, by the statutes, decisions and rules in the state of Washington, and by the statutes, decisions and rules in the state of Colorado.

ORDER

It is ordered by the Court as follows:

1. The motion to strike defendant's supplemental motion to dismiss habitual criminal counts is denied.

2. The defendant's motion to dismiss habitual criminal counts is granted as to count three of the Information and is denied as to counts four, five and six of the Information.

Dated this 24th day of June, 1985.

BY THE COURT:

WINSTON W. WOLVINGTON, Judge

APPENDIX B

COLORADO COURT OF APPEALS
No. 85CA1264

THE PEOPLE OF THE STATE OF COLORADO
Plaintiff-Appellee,

v.

JOHN WESLEY LACY,
Defendant-Appellant.

Appeal from the District Court of Jefferson County
Honorable Winston W. Wolvington, Judge

DIVISION III JUDGMENT AFFIRMED
May 14, 1987
Opinion by JUDGE CRISWELL
Van Cise and Sternberg, JJ., concur

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NOT SELECTED FOR PUBLICATION

Defendant, John Wesley Lacy, was convicted of attempted kidnapping, third degree assault, and three habitual criminal counts. He appeals from the judgment of conviction of each of the habitual criminal charges. We affirm.

Defendant contends that, in the case of each of the three prior convictions, a guilty plea was accepted without him being provided with sufficient advice respecting the charge. We disagree.

There was no testimony with respect to any of the prior guilty pleas. However, certified records of each of the earlier proceedings, including various transcripts, were received as evidence. From an examination of these, the court concluded each of the pleas of guilty met:

> "the standards set forth by the Supreme Court of the United States, the statutes, decisions and rules in the State of Ohio, by the statutes, decisions and rules in the State of Washington, and by the statutes, decisions and rules in the State of Colorado."

A defendant seeking to set aside a prior conviction obtained as a result of the entry of a guilty plea must initially make a prima facie showing that the guilty plea was constitutionally infirm; only when defendant has satisfied this initial evidentiary requirement is the prosecution required to establish by a preponderance of the evidence that the guilty plea did not violate constitutional due process standards. People v. Wade, 708 P.2d 1366 (Colo. 1985). Tested against this standard, the trial court's conclusions are correct.

The record of defendant's 1973 Ohio conviction for operating a motor vehicle without the owner's consent includes a written plea of guilty, signed by defendant and his attorney, which recites that he had been fully informed by his counsel and the court of the nature of the charge and all his constitutional rights. A copy of the indictment is attached, which describes in statutory language the elements of the offense charged. The transcript indicates that defendant appeared in open court with his attorney and, after acknowledging that he was able to read, entered his guilty plea.

This record established, prima facie, that defendant was adequately advised, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and no evidence was produced which overcame such prima facie showing.

II.

The record of defendant's 1976 Ohio conviction of theft includes a transcript of the providency hearing, a copy of the indictment, and a copy of the written plea of guilty. It reflects that the prosecutor read the indictment, which identified the specific item that was taken; the name of the owner of that item; the fact that it was of a value greater than $150; that the act was done with the purpose of depriving the owner of that item; and that defendant knowingly obtained and exercised control over that item. The written plea of guilty, signed by defendant and his attorney, states that defendant had been informed by his counsel and by the court of the nature of the charge against him. Thus, the
record supports the trial court's finding that defendant was properly advised of the elements of the offense, including the element of a specific intent or purpose.

Here, the reading of the charge, including the allegation that the act was committed with the purpose or

intention of depriving the owner, satisfies the requirement that critical elements of the crime charged must be explained in terms understandable to defendant. Unless the language of the charge is highly technical, no more full explanation of the substantive crime need be given than the charge itself. People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979). There is no indication that defendant did not have a proper understanding of the charge, including the mens rea.

III.

The record of defendant's 1980 Washington conviction of second degree assault includes a transcript confirming that defendant was represented by an assistant public defender; that the warrant was read to him; that defendant and his attorney received a copy of the information; that his constitutional rights were described; and that defendant specifically acknowledged that he choked the victim. The prosecutor provided a narrative description of the specific conduct constituting the offense and, in addition, a printed form signed by the judge reflected that defendant was informed and understood the nature of the charge.

This record also established an unrebutted prima facie showing that defendant's plea was providently entered. People v. Randolph, 175 Colo. 454, 488 P.2d 203 (1971).

In the case of each of defendant's guilty pleas, therefore, the record indicates that it was entered knowingly, intelligently, and voluntarily and, thus, met the test set out in Boykin v. Alabama, supra.

Judgment affirmed.

JUDGE VAN CISE and JUDGE STERNBERG concur.

APPENDIX C

SUPREME COURT, STATE OF COLORADO

No. 87SC262 April 24, 1989

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JOHN WESLEY LACY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO

Respondent.

---

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED

---

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JUSTICE LOHR delivered the Opinion of the Court.
JUSTICE VOLLACK concurs in part and dissents in part;

JUSTICE ROVIRA and JUSTICE MULLARKEY join in the concurrence and dissent.

We granted certiorari to review an unpublished decision of the Colorado Court of Appeals affirming the conviction of defendant-petitioner John Wesley Lacy, Jr., on three habitual criminal counts. The court of appeals upheld the trial court's denial of the defendant's motion to dismiss the habitual criminal counts at issue in this petition. The defendant asserts on certiorari that his guilty pleas to the charges underlying the habitual criminal counts were constitutionally infirm. We conclude that two of these convictions were based on constitutionally infirm pleas of guilty and could not be used as predicates for habitual criminality charges. Since at least two habitual criminal counts must be proved before a defendant can be adjudged a habitual criminal and therefore subject to mandatory increased sentencing, see §16-13-101, 8A C.R.S. (1986), we need not address the validity of the defendant's plea underlying the single remaining habitual criminal count. We therefore reverse the judgment and remand the case for resentencing.

I.

The defendant was initially charged in a two-count information alleging attempted second degree kidnapping, which is a class five felony, and assault in the third degree,[1] which is a class one misdemeanor. These charges arose out of an attempted abduction that occurred in the early morning on February 9, 1985, outside of the Elks Club in Arvada, Colorado. The victim testified at trial that after leaving her job at the Elks Club and waiting in the parking lot for her car

[1] §18-3-204, 8B C.R.S. (1986).

to warm up, Lacy approached her and pushed her into the car. During the subsequent struggle Lacy covered the victim's mouth to keep her from screaming and punched her in the face. While Lacy was attempting to get the car into gear, the victim managed to escape from the vehicle and run away.

On March 25, 1985, the information was amended to add four habitual criminal counts, §16-13-101(2), 8A C.R.S. (1986), alleging prior felony convictions in 1967, 1973, 1976, and 1980.[2] Lacy moved to dismiss the habitual criminal counts, contending that the guilty pleas supplying the bases for the convictions underlying the habitual criminal counts were accepted in violation of his constitutional rights and state law prescribing procedures for accepting guilty pleas. The trial court received into evidence certified records of each of the earlier proceedings, including transcripts of the providency hearings at which the pleas were entered. The trial court took no testimony with respect to any of the prior guilty pleas, although it did hear extensive arguments directed toward the question of their validity. On June 24, 1985, the trial court dismissed the habitual criminal count relating to the 1967

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[2] §§16-13-101 to -103, 8A C.R.S. (1986 & 1988 Supp.), provide for mandatory increased sentencing in cases involving persons adjudicated as habitual criminals. Under §16-13-101(2), a person convicted in Colorado of any felony who has been three times previously convicted upon separate felony charges shall be adjudged a habitual criminal and punished by imprisonment in a correctional facility for a life term. Under §16-13-101(1), a person convicted in Colorado of certain felonies who within ten years of the commission of the instant offense has been twice previously convicted on separate felony charges shall be adjudged a habitual criminal and punished by confinement in a correctional facility for a term ranging from twenty-five to fifty years.

conviction and denied the defendant's motion as to the remaining counts. Specifically, the court concluded that the guilty pleas underlying the remaining counts met "the standards set forth by the Supreme Court of the United States, the statutes, decisions and rules in the [states in which the pleas were taken] and by the statutes, decisions and rules in the state of Colorado."

Trial to a jury began on July 23, 1985. The jury found the defendant guilty of attempted kidnapping and third degree assault, and also found that the defendant had been convicted of a felony on each of three prior occasions as charged in the three remaining habitual criminal counts. The trial court sentenced Lacy to the Department of Corrections for a term of life imprisonment. At the sentencing hearing, the trial judge imposed an alternative sentence of four years to take effect in the event the habitual criminal adjudication were to be overturned on appeal.

Lacy appealed to the Colorado Court of Appeals, challenging the constitutional validity of each of the three convictions that formed the basis of his adjudication as a habitual criminal. In an unpublished opinion, the court of appeals rejected his challenges to the guilty pleas underlying the habitual criminal counts and therefore affirmed the judgment of conviction. The court held that the record supported a finding that each of Lacy's guilty pleas was entered knowingly, intelligently, and voluntarily.

Lacy then sought certiorari review in this court. He specifically assigns as error the trial court's refusal to dismiss the habitual criminal counts relating to the felony convictions obtained in 1973, 1976, and 1980. He asserts that these convictions were based on constitutionally defective guilty pleas and therefore were obtained in violation of due process of law. U.S. Const. amend. XIV; Colo. Const. art. II, sec. 25. As to

the convictions obtained in 1976 and 1980, we agree. We find it unnecessary to address the validity of the conviction obtained in 1973.

II.

A.

A prior conviction obtained in a constitutionally invalid manner cannot be used against an accused in a subsequent criminal proceeding to support guilt or to increase punishment. E.g., Loper v. Beto, 405 U.S. 473, 481 (1972); Burgett v. Texas, 389 U.S. 109 (1967); Watkins v. People, 655 P.2d 834, 837 (Colo. 1982); People v. Quintana, 634 P.2d 413, 416 (Colo. 1981). We therefore must determine whether Lacy's prior convictions comply with constitutional standards. See People v. Meyers, 617 P.2d 808, 814-15 (Colo. 1980).[3]

Due process of law requires that in order to provide the basis for a judgment of conviction, a guilty plea must be made voluntarily. Henderson v. Morgan, 426 U.S. 637 (1976); Boykin v. Alabama, 395 U.S. 238 (1969); People v. Chavez, 730 P.2d 321 (Colo. 1986); Wilson v. People, 708 P.2d 792 (Colo. 1985); Harshfield v. People, 697 P.2d 391 (Colo. 1985); People v. Leonard, 673 P.2d 37 (Colo. 1983); U.S. Const.

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[3] In reviewing the validity of the guilty pleas underlying Lacy's prior convictions, we need not reach the question of their validity under the statutory and case law in the states in which the pleas were taken. This is so because the relevant inquiry for due process purposes is whether a conviction used to support guilt or increase punishment is constitutionally infirm. Compliance with state law is not necessarily equivalent to the satisfaction of constitutional requirements. See People v. Meyers, 617 P.2d 808 (Colo. 1980) (evaluating validity of out-of-state guilty plea by constitutional standards); People v. Wieghard, 709 P.2d 81 (Colo. App. 1985) (same).

amend. XIV; Colo. Const. art. II, sec. 25. A guilty plea may be involuntary in the constitutional sense for one of two reasons. First, a plea may be involuntary because the defendant does not understand the nature of the constitutional protections he is waiving. Henderson, 426 U.S. at 645 n.13; Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). Alternatively, a plea may be involuntary because the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Henderson, 426 U.S. at 645 n. 13. In the latter case, a plea is not voluntary unless the defendant received "'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" Henderson, 426 U.S. at 645 (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)).

To establish that the constitutional requirement of voluntariness has been satisfied, the record as a whole must affirmatively demonstrate that the defendant understood the constitutional rights he was waiving and the critical elements of the crime to which the plea was tendered. People v. Wade, 708 P.2d 1366, 1368-69 (Colo. 1985); Harshfield, 697 P.2d at 393; People v. Keenan, 185 Colo. 317, 319, 524 P.2d 604, 605 (1974). A reviewing court cannot presume from the mere fact that a guilty plea was entered that the defendant waived his constitutional rights and understood the critical elements of the crime with which he was charged. Boykin, 395 U.S. at 242-43; Wade, 708 P.2d at 1368-69.

1.

As to the requirement that the defendant understand the nature of the constitutional protections he is waiving, we have previously held that the trial court need not follow a formalistic litany when accepting a guilty plea. E.g., Wade, 708 P.2d at 1368. Rather, the record as a whole must simply show

that the defendant entered his guilty plea voluntarily and understandingly. Wade, 708 P.2d at 1368-69; Keenan, 185 Colo. at 319, 524 P.2d at 605; People v. Marsh, 183 Colo. 258, 263, 516 P.2d 431, 433 (1973). Moreover, due process does not require a specific waiver of even the three constitutional rights highlighted in Boykin v. Alabama, 395 U.S. 238.[4] Wade, 708 P.2d at 1369; Marsh, 183 Colo. at 262-63, 516 P.2d at 433; see generally J. Bond, Plea Bargaining and Guilty Pleas §3.8(b)(1983)(a majority of courts have refused to vacate pleas simply because the record does not affirmatively show a specific waiver of the three constitutional rights referred to in Boykin). Thus, we have rejected an assertion that "when the record of providency proceedings contains no evidence of any reference to the prosecution's burden of proof in criminal trials, any guilty plea accepted during such proceedings must be deemed constitutionally invalid." Wade, 708 P.2d at 1370.

Nor does due process generally require that the record demonstrate an adequate factual basis for the plea. See McCarthy v. United States, 394 U.S. 459, 465 (1969)(procedure embodied in Rule 11 of the Federal Rules of Criminal Procedure, which directs court to determine that factual basis exists for guilty plea, has not been held to be constitutionally mandated); Smith v. McCotter, 786 F.2d 697, 702-03 (5th Cir. 1986); Rodriguez v. Ricketts, 777 F.2d 527, 528 (9th Cir. 1985); Willbright v. Smith, 745 F.2d 779, 780 (2d Cir. 1984); Paulsen v. Manson, 525 A.2d 1315, 1318 (Conn. 1987); see also 2 W. LaFave & J. Israel, Criminal Procedure §20.4(f)

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[4] In Boykin, the United States Supreme Court specified three constitutional rights waived by a defendant who tenders a guilty plea: the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. 395 U.S. at 243.

(1984 & 1989 Supp.).[5] The situation may be otherwise where a plea is entered under circumstances where the defendant insists that he is innocent. See North Carolina v. Alford, 400 U.S. 25 (1970).[6]

2.

As to the requirement that the defendant understand the nature of the charges against him, the record must affirmatively demonstrate the defendant's understanding of the critical elements of the crime to which the plea is tendered. E.g., Harshfield, 697 P.2d at 393; Leonard, 673 P.2d at 39; Watkins, 655 P.2d at 837; see also ABA Standards for Criminal Justice, Standard 14-1.4 (2d ed. 1980). In order to satisfy the requirement, the court should explain the critical elements "'in terms which are understandable to the defendant.'" Watkins, 655 P.2d at 837 (quoting People v. Cumby, 178 Colo. 31, 33,

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[5] A number of our opinions contain statements to the effect that a guilty plea cannot be accepted absent a record affirmatively showing a factual basis for the plea. See Wilson v. People, 708 P.2d 792, 798 (Colo. 1985); People v. Murdock, 187 Colo. 418, 419, 532 P.2d 43, 44 (1975); People v. Alvarez, 181 Colo. 213, 217, 508 P.2d 1267, 1270 (1973). However, in these cases the requirement that a factual basis support the plea appears to find its source in Crim. P. 11, not in the state or federal constitution.

[6] Under these circumstances, at least one federal circuit court has held that a judge must inquire fully into the facts to determine that a factual basis exists for the plea as "an essential part of the constitutionally-required finding of a voluntary and intelligent decision to plead guilty." Willett v. State, 608 F./2d 538, 540 (5th Cir. 1979); see generally J. Bond, Plea Bargaining and Guilty Pleas §3.55(c)(3) (2d ed. 1982).

495 P.2d 223, 224 (1972)).

Our cases have recognized that the degree of explanation that a court should provide depends on the nature and complexity of the crime and that no particular litany need be followed in accepting a tendered plea of guilty. Harshfield, 697 P.2d at 394; Leonard, 673 P.2d at 39. However, a showing that defense counsel gave some explanation to his client of the charge to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered. Watkins, 655 P.2d at 837; People v. Mason, Jr., 176 Colo. 544, 545-46, 491 P.2d 1383, 1383-84 (1971).[7]

Where the crime to which the plea is entered is

[7] It may be appropriate in some circumstances to presume that the defendant has been adequately informed, either by his lawyers or at some proceeding other than the providency hearing, of the charges on which he was indicted. Marshall v. Lonberger, 459 U.S. 422, 436-38 (1983); Henderson, 426 U.S. at 647. In Marshall, the United States Supreme Court found several factual findings made by the trial court significant to its conclusion that the accused's plea of guilty was voluntary and intelligent. Specifically, the trial court found that the accused was intelligent and experienced in the criminal justice system and was well-represented at all stages of the plea proceedings by competent counsel. In addition, the accused's counsel stipulated at the providency hearing and in the accused's presence that the indictment, which contained an explanation of the charges against him, sustained the plea of guilty. Finally, the transcript of the providency hearing revealed that a person of the accused's intelligence and experience would have understood certain statements made by the presiding judge as referring to the indictment's charge of attempt to kill. Marshall, 459 U.S. at 435-38.

relatively simple, reading the information to the defendant is an acceptable method of advising him of the nature of the offense charged. People v. Trujillo, 731 P.2d 649, 651 (Colo. 1986); Leonard, 673 P.2d at 39; see also People v. Muniz, 667 P.2d 1377, 1382-83 (Colo. 1983). Thus, further explanation is unnecessary where the crime is "'readily understandable to a person of ordinary intelligence from a mere reading of the information without further explanation by the court.'" Leonard, 673 P.2d at 39 (quoting Muniz, 667 P.2d at 1383). Offenses that we have considered to be understandable by persons of ordinary intelligence include aggravated robbery, Wright v. People, 690 P.2d 1257 (Colo. 1984); People v. Edwards, 186 Colo. 129, 526 P.2d 144 (1974), and second degree murder, People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979).

Crimes of greater complexity require a greater showing of the defendant's understanding of the critical elements of the crime to which the plea is entered. Leonard, 673 P.2d at 39. Offenses that we have considered to be of greater complexity include conspiracy to commit burglary, Leonard, 673 P.2d at 41-42; Muniz, 667 P.2d at 1383-84, breaking and entering a motor vehicle with intent to commit the crime of larceny, Harshfield, 697 P.2d at 395, conspiracy to commit escape, Watkins, 655 P.2d at 838, and assault to rob, People v. Sanders, 185 Colo. 356, 524 P.2d 299 (1974).

Regardless of the complexity of the crime, however, the record must demonstrate that the defendant understood any mental state element of the crime to which he pled guilty. See Harshfield, 697 P.2d at 394-95; Gorniak, 197 Colo. at 291-92, 593 P.2d at 350-51; Wilson, 708 P.2d at 796-97. Moreover, an inquiry by the court into whether the defendant understands the nature of charges against him is of utmost importance in connection with charges requiring proof of specific intent.

People v. Kelley, 189 Colo. 31, 536 P.2d 39 (1975).

B.

A defendant attacking the constitutionality of a prior conviction in habitual criminal proceedings must make a prima facie showing that the guilty plea was unconstitutionally obtained. Wade, 708 P.2d at 1368; Watkins, 655 P.2d at 837; Quintana, 634 P.2d at 416. A prima facie showing means evidence that when considered in a light most favorable to the defendant, will permit the court to conclude that the conviction failed to meet relevant constitutional standards. Watkins, 655 P.2d at 837. Once a prima facie showing is made, the conviction is not admissible unless the prosecution establishes by a preponderance of the evidence that the conviction was obtained in accordance with the defendant's constitutional rights. Wade, 708 P.2d at 1368; Watkins, 655 P.2d at 837; Quintana, 634 P.2d at 416.

III.

A.

The facts pertinent to the resolution of the issues before us are taken from the documents and transcripts relating to the defendant's prior convictions. We turn first to the guilty plea entered in Spokane County, Washington, on June 6, 1980, to a charge of second degree assault. The record of this conviction includes a copy of the information and a transcript of the providency hearing, at which Lacy appeared and was represented by an assistant public defender.

At the outset of the hearing, the prosecutor represented that "the warrant has been read"[8] and that the defendant and his counsel had received a copy of the information. The information states the charge as follows: "That the defendant, JOHN WESLEY LACY, JR., in Spokane County, Washington, on or about March 6, 1980, with intent to commit the felony of Second Degree Rape, did knowingly assault Geraldine A. Muse, a human being." The transcript of the hearing reveals that the following exchange took place between the court and Lacy concerning the nature of the charge to which he was offering a plea of guilty:

> THE COURT: You are appearing here with your attorney, Mr. Hemingway; you have talked to him about this; you understand this charge?
>
> MR. LACY: Yes, sir.
>
> THE COURT: You know that you're accused of the crime of Second Degree Assault, and that the maximum sentence for this is ten years?
>
> MR. LACY: Yes.

The court then informed the defendant of the possible penalties upon conviction and of his constitutional rights, and obtained his acknowledgement that he understood these matters and also understood that by pleading guilty he would waive his constitutional rights. The defendant then offered his

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[8] The record does not appear to contain a record of the "warrant" referred to by the prosecuting attorney.

plea of guilty and acknowledged that it was made freely and voluntarily and was not based on threats or promises. The court noted that the defendant acknowledged that when earlier asked to state what he did that caused the charge to be filed, the defendant said he choked the victim. Thereafter, the prosecuting attorney, in Lacy's presence, described in some detail the facts of the case as they were set forth in a report.

Lacy claims that this plea was invalid for two reasons: First, that he was not informed that the prosecution would have to prove all of the elements of the crime beyond a reasonable doubt; second, that he was not informed of the mental state necessary to commit the crime of second degree assault.

We reject Lacy's contention that the Spokane County Superior Court's failure to advise him of the prosecution's burden of proof renders his plea constitutionally infirm. This claim was resolved adversely to Lacy in our decision of People v. Wade, 708 P.2d at 1370, and we adhere to the view expressed in that opinion that due process does not require specific advisement of the prosecution's burden of proof in criminal trials. However, we conclude that the defendant's 1980 conviction is constitutionally infirm because the record does not establish that Lacy understood the critical mental state element of the crime with which he was charged.

The transcript of the 1980 providency hearing, at which the defendant pled guilty, fails to show that the court explained to Lacy any of the elements of the crime of second degree assault. The crime of second degree assault as it was defined in the information included the following critical elements: (1) knowingly assaulting a human being, (2) with intent to commit the felony of second degree rape. The record contains no showing that the court made even a general effort to explain the mental states critical to the offense of second degree

assault or to describe in any way the elements of the crime of second degree rape. In our view, the defendant's affirmative response to the court's inquiry whether he had spoken to his attorney and understood the charge does not establish that he understood the critical elements of that charge. Nor do we regard this crime as having elements that are understandable from a bare reading of the information without further explanation. Indeed, the defendant's own assertion at the providency hearing that he was accused of "choking" the victim strongly suggests that he was confused about the precise nature of the crime to which he pled guilty. As noted earlier, a court's inquiry into the defendant's understanding of the nature of the charges against him is of the greatest importance where, as here, the charges require proof of specific intent. People v. Kelley, 189 Colo. 31, 536 P.2d 39 (1975).

Based on the record before us, we conclude that the defendant made a prima facie showing that he lacked an understanding of the nature and elements of the crime of second degree assault. See Watkins, 655 P.2d at 837. The prosecution produced no evidence to carry its burden to show that the conviction was constitutionally obtained. See id. We therefore conclude that the trial court erred in denying Lacy's motion to dismiss the habitual criminal count relating to the 1980 felony conviction.

B.

We next consider the guilty plea entered by Lacy in Mahoning County, Ohio, on February 11, 1976, to a charge of theft. The record relating to this conviction includes a copy of the indictment, a copy of the written plea of guilty, and a transcript of the providency hearing. The indictment charges Lacy with having knowingly obtained or exerted control over a 1964 Pontiac Catalina owned by one Elbee Billup, without the consent of Elbee Billup or a person authorized to give

such consent, and with the purpose to deprive Billup of the car. The written plea of guilty, signed by Lacy and his attorney, states that Lacy had been informed by his counsel and by the court of the nature of the charge against him.[9]

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[9] The typewritten form reads as follows:

I, John Lacy, being this day before the Court with my counsel. . . and having been informed by my counsel and by the Court of all of my constitutional rights, including the following:

1. The nature of the charge or charges against me and the maximum penalty or penalties involved.
2. The effect of a guilty or no contest plea and that the Court may proceed with judgment and sentence.
3. That by my plea, I am waiving my right to a jury trial; my right to confront witnesses against me; my right to have compulsory process for obtaining witnesses in my favor; my right to require the State of Ohio to prove my guilt beyond a reasonable doubt at a trial where I can not be compelled to testify against myself, and if I elect not to testify, the Prosecuting Attorney, the Court or no one else can comment on my failure to so testify.
4. That if I were tried and convicted, that I would have a right to appeal and to have an attorney appointed to prosecute such appeal if I am indigent.

I hereby waive and reject all of these rights and withdraw my former plea of "not guilty" and enter my plea of "guilty" to the indictment charging me with the following: 2913.02(A)(1) -- Theft (F4) 6mo-1-1 1/2 to 5.

The transcript of the providency hearing, at which Lacy was present, reveals that the prosecuting attorney read the charge aloud. The victim, Elbee Billup, appeared at the hearing and stated: "As long as [Lacy] agreed to pay the damage to my car, naturally, I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So I won't press charges against him, if it please the Court." The trial court then engaged in the following exchange with the defendant:

> [THE COURT]: All right, Mr. Lacy, the charge here is a felony of the fourth degree; it's the less serious of all of our felonies. However, it is still a serious charge. And the charge is, as [the prosecuting attorney] has stated, that you very, very briefly took Mr. Billup's car without his consent on the 7th of November?
>
> [THE DEFENDANT]: Right.
>
> [THE COURT]: And, of course, if you did that, then you are guilty of this crime. By pleading guilty to it, you put yourself in a position where you are subject to a sentence of imprisonment of not less than six months, nor more than five years. Now this can be six months,

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This plea is voluntarily made and is not the result of any coercion or intimidation. No promises have been made to me by anyone to secure the above pleas.

I am able to read, have read, and fully understand the foregoing.

one year, one and one-half years up to two years and a maximum of five years, do you understand that?

[THE DEFENDANT]: Yes.

The judge then explained to Lacy the constitutional rights he would waive by pleading guilty. Lacy acknowledged that he was voluntarily entering his plea and that he had signed the written plea of guilty. The court then accepted the plea.

Lacy contends that the court's failure to explain to him the critical elements of the crime with which he as charged renders the plea constitutionally defective. He also asserts that the plea was without a factual basis and therefore should have been rejected. We conclude that the defendant made a prima facie showing of the constitutional invalidity of his plea and that the prosecution failed to carry its resulting burden to establish that the plea was not constitutionally infirm. See Watkins, 655 P.2d 837.

Like the crime of second degree assault with intent to rape, the theft charge to which Lacy pled guilty in 1976 is a specific intent crime and its elements are not readily understandable without further explanation. The record of the February 11, 1976, providency hearing is entirely devoid of any accurate or understandable explanation of the charge. Although the prosecuting attorney read the charge in Lacy's presence as it was described in the indictment, the only explanation directed specifically to the defendant concerning the elements of the crime was the court's statement that the charge was that Lacy "very, very briefly took Mr. Billup's car without his consent." The court made no mention of the specific intent element of the crime of theft, i.e., the intent to deprive Billup of the car, but, to the contrary, implied that no specific intent was required to commit the offense. In

addition, the statements made by Elbee Billup, the alleged victim of the crime tended to refute the elements of the crime, and should have prompted the court to examine more thoroughly the defendant's understanding of the crime to which he was pleading guilty. Although the court was not constitutionally obligated to determine that an adequate factual basis existed to support the plea,[10] it was obligated to determine that the guilty plea was made voluntarily and understandingly. Under these circumstances, it is evident that Lacy was not given an explanation and did not evince an understanding of the true nature of the charge to which he pled guilty. Accordingly, the resulting conviction cannot be used to support a habitual criminal conviction.

The judgment of the Colorado Court of Appeals is reversed, and the cause is remanded with directions to remand to the trial court for imposition of a sentence of four years imprisonment, the alternative sentence imposed by the trial judge in the event the habitual criminal adjudication were to be reversed on appeal.

JUSTICE VOLLACK concurs in part and dissents in part; and JUSTICE ROVIRA and JUSTICE MULLARKEY join in the concurrence and dissent.

JUSTICE VOLLACK concurring in part and dissenting in part:

I agree with the majority's finding that the defendant has made a prima facie showing of the constitutional invalidity of his 1976 guilty plea. I write separately, however, because I

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[10] The record contains no indication that Lacy entered the type of plea discussed in North Carolina v. Alford, 400 U.S. 25 (1970).

disagree with the majority's conclusion that Lacy made a prima facie showing that he lacked an understanding of the nature and critical elements of second degree assault when he entered a guilty plea in 1980. I therefore dissent to Part III.A., and concur in the remainder of the majority opinion.

Lacy was represented by counsel at the providency hearing. The majority notes that Lacy's counsel had been provided with a copy of the information. The information charged Lacy with the "knowing assault" of his victim "with intent to commit the felony of Second Degree Rape." See Noel v. Idaho, 113 Idaho 92, ___, 741 P.2d 728, 730 (Idaho App. 1987) ("A defendant must be informed of the intent element before a guilty plea can be regarded as voluntary. This requirement may be met when the information, referring to the intent element, is read to the defendant.") The trial court said to Lacy: "You are appearing here with your attorney, . . . you have talked to him about this; you understand the charge?" Lacy responded in the affirmative. It is true that the court did not specify that the charge to which Lacy was pleading guilty was second degree assault "with intent to commit the felony of second degree rape." There was, however, a discussion on the record and in the presence of Lacy and his counsel regarding the disposition of the case and the filing of a "Sexual Psychopathy Petition."[1] The parties

[1] A Washington statute provides that if a court finds reasonable grounds to believe that a defendant is a sexual psychopath, "the court shall order said defendant confined at the nearest state hospital for observation as to the existence of sexual psychopathy" for a period not to exceed 90 days. Wash. Rev. Code §71.06.040 (1987); see In re Knapp, 102 Wash. 2d 466, ___, 687 P.2d 1145, 1148 (1984); State v. Wilmoth, 22 Wash. App. 419, ___, 589 P.2d 1270, 1271 (1979).

agreed that a petition in sexual psychopathy would be filed and that Lacy would be sent for the 90-day evaluation.

Most significantly, the prosecuting attorney entered a detailed account of the assault that included the information that Lacy had pulled the victim into his car "and she struggled and . . . he then choked her with his hands around her neck, and she lost consciousness." When the victim regained consciousness she awoke to find her assailant sitting in the car masturbating; he again attempted to attack her and she again struggled. "Threats were made that she should comply with his demands or she would be killed, and she then stopped struggling and he was able to partially remove her blouse by unzipping it, and, again, to take her pants down to her ankles."

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson v. Morgan, 426 U.S. 637, 647 (1976), quoted in Marshall v. Lonberger, 459 U.S. 422, 436 (1982).

Considering the record as a whole, I would conclude that the defendant sufficiently understood the mental state element of the charge--that he intended to commit rape when he assaulted Annette Muse. The prosecutor's presentation of the factual basis for the charge established the sexual nature of

the assault in detail.[2] "Upon hearing this information, the defendant did not protest or attempt to withdraw his earlier guilty plea." People v. Adrian, 701 P.2d 45, 48 (Colo. 1985). We came to a similar conclusion in People v. Scheer, 184 Colo. 15, 518 P.2d 833 (1974), where we held:

> The record in this case indicates that after the court accepted the guilty pleas the prosecution proceeded to state to the court and the jury a summary of the prosecution's evidence in the case, which included a full statement about the attempted holdup and shooting. Defendant Scheer and his counsel were present in the courtroom for this recitation and no objection was made. . . . We find that there was a factual basis in the record for the plea in this case and that defendant understandingly made his plea.

Id. at 21, 518 P.2d at 835-36. In addition, the defendant was present for discussions on the record with his attorney

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[2] [T]he record of the providency hearing shows that the Florida court neither advised defendant of the elements of the offenses nor read the information to him. However, the testimony of the defendant and the statements of the defendant's counsel clearly reveal that the defendant knew and understood the elements of the charge.

> The record of the providency hearing is sufficient to show that defendant understood the critical elements of the offenses to which he pled guilty.

People v. Henderson, 745 P.2d 265, 267 (Colo. App. 1987), cert. denied, (Oct. 5, 1987).

concerning the filing of a petition of his sexual psychopathy evaluation. Again, he did not protest. Based on this, I cannot conclude that the defendant did not understand the sexual nature of the assault charge. We have noted that "a factual basis may be established by the record as a whole" in concluding that reports by two psychiatrists plus the affidavit accompanying the information were sufficient to establish the factual basis for a plea. Wilson v. People, 708 P.2d 792, 798-99 (Colo. 1985). I would find that the defendant was sufficiently aware of the nature of the charge to enter a knowing and voluntary plea of guilty.

The effect of the majority's holding is to create a "form over substance" application of Crim. P. 11 as it applies to specific intent crimes. Lacy conceded that he assaulted the victim, thus establishing the first element of the crime. I believe that the intent element--intent to commit second degree rape--was understandable from a reading of the information and from the totality of the proceedings in the record. The trial court is not required to follow a "formal ritual." People v. Wade, 708 P.2d 1366, 1368 (Colo. 1985). The defendant conceded that he had spoken with his attorney and that he understood the charge. I therefore concur in part and dissent in part.

I am authorized to say that JUSTICE ROVIRA and JUSTICE MULLARKEY join in this concurrence and dissent.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 87SC262
CERTIORARI TO THE COLORADO COURT OF APPEALS, #85CA1264
DISTRICT COURT, JEFFERSON COUNTY, #85CR249

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ORDER OF COURT

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JOHN WESLEY LACY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

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Upon consideration of the Petition for Rehearing filed by the Respondent in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that Opinion is modified and, as modified, said Petition for Reheairng shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 5, 1989.
Justices Erickson, Vollack and Mullarkey would grant.

cc: Honorable Winston W. Wolvington
%Honorable Gaspar F. Perricone, Chief Judge
Hall of Justice
1701 Arapahoe Street
Golden, Colorado 80401-6199

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